NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1740

STATE OF LOUISIANA

VERSUS

BRIAN ANTHONY SCOTT

On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, Louisiana
Docket No. 601,902, Division "D"
Honorable David W. Arceneaux, Judge Presiding

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BEFORE: PARRO, WELCH, AND KLINE,[1] JJ.

Judgment rendered APR 2 9 2013

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[1] **Judge William F. Kline, Jr., retired, is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.**

PARRO, J.

The defendant, Brian Anthony Scott, was charged by bill of information with simple burglary, in violation of LSA-R.S. 14:62. He entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The state filed a habitual offender bill of information, the trial court adjudicated the defendant a fourth or subsequent felony habitual offender, and the defendant was sentenced to life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence.[2] The defendant now appeals, raising the constitutionality of the sentence. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On April 2, 2011, items were stolen from an old storage barn at the Montegut Recreation Center in Terrebonne Parish. The barn had been partially fenced to prevent break-ins. Danny Picou, the grounds supervisor, contacted the sheriff's office after noticing that the fencing was down and that items were missing, including a chair rack, a basketball goal, and a cast iron sink. Surveillance footage allowed law enforcement personnel to develop a description of the vehicle suspected to be used by the perpetrator. Due to a traffic violation on April 6, the police stopped a vehicle matching the description (a white van with damage on the front driver's side and a peeled decal on the driver's door) due to a traffic violation. The defendant and Elizabeth Davis and her two children were the occupants of the vehicle. The defendant and Davis agreed to be questioned at the sheriff's office and, after being advised of and waiving his **Miranda** rights, the defendant admitted to taking the items.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant argues that, in this case, there are compelling reasons for a downward departure from the mandatory life sentence. The defendant notes that his prior convictions did not involve crimes of violence and that one of the predicate convictions, the 1992 conviction for the offense of illegal

[2] The habitual offender adjudication was based on a 1992 conviction of illegal possession of stolen things, a 1995 conviction of possession of marijuana with intent to distribute, a 2000 conviction of simple burglary of an inhabited dwelling, and 2007 convictions on fourteen counts on illegal possession of stolen things.

possession of stolen things valued between one hundred and five hundred dollars, was no longer classified as a felony at the time of the instant offense. While conceding that ten years did not elapse between the convictions, the defendant notes that three of the offenses occurred more than ten years prior to his commission of the instant offense and that only one of the predicates was a violation of the Uniform Controlled Dangerous Substances Law.[3] The defendant also notes, in the instant case, that he was forty-two years old when the crime was committed and that he admitted to taking the items and told the officers where they could be recovered. Referencing the growth of Louisiana's "prison industrial complex," the facts of the case, and his criminal history, the defendant argues that his life sentence makes no meaningful contribution to acceptable goals of punishment, and is nothing more than a needless imposition of punishment and a waste of scant economic and human resources. The defendant concludes that the sentence is grossly out of proportion to the severity of the crime.

At the outset, we note that our review of the record shows that it does not contain a written motion to reconsider sentence. However, the defense counsel objected after the habitual offender sentencing, stating: "Please note our objection to the sentence as constitutionally excessive. I'd like to make an oral motion to reconsider sentence at this time." See LSA-C.Cr.P. art. 881.1(B). Under LSA-C.Cr.P. art. 881.1, the defendant must set forth the "specific grounds" on which the motion to reconsider is based. However, in order to preserve a claim of constitutional excessiveness, the defendant need not allege any more specific ground than that the sentence is excessive. If the defendant does not allege any specific ground for excessiveness or present any argument or evidence not previously considered by the court at original sentencing, then the defendant does not lose the right to appeal the sentence; the defendant is simply relegated to having the appellate court consider the bare claim of excessiveness. **State v. Mims**, 619 So.2d 1059-60, (La. 1993) (per curiam). Thus, this court will consider the defendant's bare claim of excessiveness.

The Eighth Amendment to the United States Constitution and Article I, Section

[3] The defendant is not arguing that the cleansing period lapsed as to any of the predicate convictions, but merely argues that the lengthy time period between the predicate offenses and the instant offense should be considered a mitigating factor.

20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454.

We note that the instant offense and the 2000 predicate conviction of simple burglary of an inhabited dwelling are punishable by imprisonment for up to twelve years, and the 1995 conviction of possession of marijuana with intent to distribute constitutes a violation of the Uniformed Controlled Dangerous Substances Law, punishable by imprisonment for more than ten years. LSA-R.S. 14:62(B); LSA-R.S. 14:62.2; and LSA-R.S. 40:966(B)(3). Thus, without even considering the predicate convictions for illegal possession of stolen things, the defendant was subject to a mandatory sentence of life imprisonment pursuant to LSA-R.S. 15:529.1(A)(4)(b). The legislature has the unique responsibility to define criminal conduct and to provide for the penalties to be imposed against persons engaged in such conduct. The penalties provided by the legislature reflect the degree to which the criminal conduct affronts society. **State v. Baxley**, 94-2982 (La. 5/22/95), 656 So.2d 973, 979. Imposition of a sentence, although within the statutory limit, may violate a defendant's constitutional right against excessive punishment. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). Thus, imposition of a minimum sentence required under a particular statute might also violate a defendant's constitutional protection against excessive punishment. See **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993).

In **Dorthey**, the Louisiana Supreme Court considered a constitutional challenge to the Habitual Offender Law. In that case, the supreme court observed that it is the legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Furthermore, courts are charged with applying these punishments, unless they are found to be unconstitutional. **State v. Dorthey**, 623 So.2d at 1278. The supreme court provided in **Dorthey** that the judiciary maintains

the distinct responsibility for reviewing sentences imposed in criminal cases for constitutional excessiveness. Thus, if a trial court determines that the habitual offender punishment mandated by LSA-R.S. 15:529.1 makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime" the court has the option, indeed the duty, to reduce such a sentence to one that would not be constitutionally excessive. **State v. Dorthey**, 623 So.2d at 1280-81.

In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from a mandatory minimum sentence. The court held that a trial judge may not rely solely upon the nonviolent nature of the instant crime or past crimes as evidence which justifies rebutting the presumption of constitutionality. Further, the court held that, to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

State v. Johnson, 709 So.2d at 676.

The defendant has not presented any particular or special circumstances that would support a deviation from the mandatory life sentence provided in LSA-R.S. 15:529.1. Based on the record before us, we find that the defendant has failed to show that he is exceptional or that the mandatory life sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Thus, we find that a downward departure from the mandatory life sentence was not required in this case. The mandated life sentence imposed is not excessive and the sole assignment of error lacks merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.